

STATE OF SOUTH CAROLINA	)	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND	)	
	)	
In the Matter of Contract Controversy:	)	<b>DECISION</b>
	)	CASE No. 2009-140
	)	
William T. McCormick	)	
	)	
v.	)	
	)	
South Carolina Department of Education)	)	MAILING DATE: February 5, 2010
	)	
Materials Management Office	)	
Fixed Price Bid for Educational	)	POSTING DATE: February 5, 2010
Consultant Services	)	
<u>Contract No. 03-S5835-286</u>	)	

This matter comes before the Chief Procurement Officer (CPO) pursuant to Section 11-35-4230 of the South Carolina Consolidated Procurement Code (Code). By letter dated October 13, 2009, William T. McCormick requested resolution of a contract controversy between him and the South Carolina Department of Education (SCDE). SCDE subsequently filed a Motion to Dismiss the matter as untimely, and Mr. McCormick filed a response. This Decision follows.<sup>1</sup>

### **BACKGROUND**

The Materials Management Office (MMO), on behalf of SCDE, issued a fixed price bid seeking to procure educational consultant services. The contracts awarded by MMO in this matter had a maximum contract period of September 1, 2003 – August 31, 2008.

Mr. McCormick submitted a bid to participate in the fixed price contract on October 23, 2006. On November 16, 2006, Teresa S. Livingston, Procurement Officer for SCDE, issued the award to Mr. McCormick. Subsequently Mr. McCormick entered into two engagement

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<sup>1</sup> The CPO had scheduled a hearing for January 26, 2010 in order to resolve this matter. However, Mr. McCormick declined to attend, and the hearing was cancelled.

agreements with SCDE: 1) the first ended on July 31, 2007; and 2) the last covered the period August 15, 2007 through June 30, 2008.

### **CONCLUSIONS OF LAW**

Section 11-35-4230(2) of the Code states:

Either the contracting state agency or the contractor...may initiate resolution proceedings before the appropriate chief procurement officer by submitting a request for resolution to the appropriate chief procurement officer in writing setting forth the specific nature of the controversy and the specific relief requested with enough particularity to give notice of every issue to be decided.

The Code further provides that “[a] request for resolution of contract controversy must be filed within one year of the date the contractor last performs work under the contract...” S.C. Code Ann. 11-35-4230(2). See also, In Re: Protest of Architectural Engineering Associates, Case No. 1997-10 (finding that a contract controversy must be filed within one year of when the contractor last performs work on the contract.)<sup>2</sup>

Per his contract controversy letter and response to the Motion to Dismiss, the last date Mr. McCormick taught a class was May 2, 2008, which was also the date he reported the final grades. Therefore, his contract controversy was required to be filed no later than May 2, 2009. However, Mr. McCormick’s contract controversy letter was not filed until October 13, 2009, which was beyond the time allowed under the Code.<sup>3</sup>

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<sup>2</sup> S.C.Code Ann. § 11-35-4230(2) does provide an exception stating that “in the case of latent defects a request for resolution of a contract controversy must be filed within three years of the date the requesting party first knows or should know of the grounds giving rise to the request for resolution.” However, a latent defect is defined as “a hidden or concealed defect. One which could not be discovered by reasonable and customary inspection; one not apparent on the face of goods, product, document, etc.” Black’s Law Dictionary, 5<sup>th</sup> Ed. (1979). Despite Mr. McCormick’s contention to the contrary, he did not offer any proof that this case met the latent defect exception.

<sup>3</sup> In his response to the Motion to Dismiss, Mr. McCormick contends, “[t]he last work I performed under the contract was to answer an email sent to me...on May 20, 2008.” Further, SCDE also notes that the last agreement issued to Mr. McCormick ended on June 30, 2008, and the fixed price contract expired on August 31, 2008. However, Mr. McCormick’s filing was untimely regardless.

The South Carolina Procurement Review Panel (Panel) has repeatedly held that the time for filing cannot be waived even by the conduct or consent of the parties. See In Re: Protest of National Cosmetology Ass'n, Case No. 1996-17 (finding that “where the appeal is not taken within the time provided, jurisdiction cannot be conferred by consent or by waiver”); In Re: Protest of Jones Engineering Sales, Inc., Case No. 2001-8 (finding that the time for filing protests is jurisdictional and may not be waived by conduct or consent of the parties); In Re: Protest of Vorec Corporation, Case No. 1994-9. Further, the Panel has concluded that “a protestant does not need to know every minute fact involved in his protest in order to start the...time limit running; it is enough that a party have reasons sufficient to support a protest.” In Re: Protest of Oakland Janitorial Services, Inc., Case No. 1988-13.

Because Mr. McCormick filed his request for resolution of a contract controversy more than a year after he last worked, this contract controversy is dismissed as untimely.



R. Voight Shealy  
Chief Procurement Officer  
for Supplies and Services

February 5, 2009

Date

Columbia, S.C.

## STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4230, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of the posting of the decision in accordance with Section 11-35-4230(5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel, or to the Procurement Review Panel, and must be in writing setting forth the reasons why the person disagrees with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and any affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or legal.

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Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: [www.procurementlaw.sc.gov](http://www.procurementlaw.sc.gov)

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the 2009-2010 General Appropriations Act, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410(4). . . . Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." 2008 S.C. Act No. 310, Part IB, § 83.1. PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).